In the Supreme Court of the United States.

OCTOBER TERM, 1922.

THE PRICE FIRE & WATER PROOFING Company, appellant, *v.* THE UNITED STATES. } No. 257.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

The appeal in this case brings up for review a judgment of the Court of Claims in so far as that court dismissed one of the causes of action set forth in the petition. The petition set forth ten causes of action. Upon the first nine the Court of Claims rendered judgment in favor of the plaintiff, but decided that the tenth cause of action was without merit.

The plaintiff is a New York corporation engaged in the business of waterproofing and fireproofing cloth. During the war it did a large amount of work of this kind for the War Department, and from about January 1st, 1918, until the armistice its plant was practically given up to Government work. Soon after

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the declaration of war the plaintiff's general sales manager sought the business and submitted samples. The committee in charge under the Council of National Defense, known as the Cotton Goods Committee, was seeking sources of supply. The plaintiff was invited to send a representative for a conference and sent its president, William B. Price. Mr. Price made up and submitted a schedule of prices for the treatment of various weights and widths of material by the treatment known as Emla A. After acceptance of the proposition it was concluded that the process known as the Repelite process would be more satisfactory, and Mr. Price submitted prices by that process which were accepted. Conferences were had with respect to the capacity of the plant, and it was agreed between the plaintiff's representatives and the committee that the plant should be at the disposal of the Government from and after January 1, 1918. (Third finding of fact, p. 33.)

From time to time various instruments or orders were issued to the plaintiff in the form of authorizations and orders and notices of the awarding of contracts, and also from time to time there were various modifications and partial cancellations of these orders and so-called supplemental agreements, and order directions and modifications were given by telephone and telegraph. These various orders or authorizations were not executed in the manner provided by law and were in an irregular and unauthorized form. After the cessation of hostilities the defendant canceled all orders then unfilled, and for the work

actually done the plaintiff was paid in accordance with the prices agreed upon. (Fourth finding of fact, p. 34.)

Thereafter, the plaintiff presented to the Secretary of War under Section 1 of the Act of March 2, 1919, known as the Dent Law, 40 Stat. 1272, a claim for losses incurred, and, while the Secretary of War offered to pay and adjust certain amounts and parts of the claim, the plaintiff was not willing to accept the adjustment, and suit was then brought in the Court of Claims.

The first nine causes of action were described in the petition under the following heads:

(1) Storage and hauling charges on untreated gray goods: On this cause of action the Court of Claims awarded the plaintiff the sum of	$2,147.05
(2) Storage charges on treated goods after notice of completion: On this cause of action the Court of Claims awarded the plaintiff the sum of	544.60
(3) Alterations and additions to the plant for storage purposes, including restoration: On this cause of action the Court of Claims awarded the plaintiff the sum of	11,249.16
(4) Extra protection demanded by the defendants: On this cause of action the Court of Claims awarded the plaintiff the sum of	2,953.11
(5) Wages paid unemployed labor from December 29, 1917, to March 23, 1918: On this cause of action the Court of Claims awarded the plaintiff the sum of	3,013.52
(6) Allowance on chemicals and materials left over after suspension of work: On this cause of action the Court of Claims awarded the plaintiff the sum of	3,877.87
(7) Increased plant facilities: On this cause of action the Court of Claims awarded the plaintiffs the sum of	20,000.00
(8) Deductions made by defendants because of increased yardage resulting from treatment and for alleged loss in shipment: On this cause of action the Court of Claims awarded the plaintiff the sum of	954.09
(9) Insurance premiums paid by plaintiff in excess of that provided for: On this cause of action the Court of Claims awarded the plaintiff the sum of	2,960.68
Total amount awarded by Court of Claims	47,700.08

The tenth cause of action, the one involved in this appeal, was entitled in the petition "Loss to commercial business." The appellant, on page 2 of its brief, describes this cause of action as "expenses incurred by it in its efforts to keep its business alive and organization existent." In its petition plaintiff demanded under this cause of action $590,000, but this claim has now been reduced to $125,000.

The Court of Claims found that plaintiff's predecessor company was incorporated in 1904, but that its processes, assumed in the beginning to be complete, had to undergo experimentation and further development, and this continued until 1912. By that time the company's fireproofing process was recognized as a superior one, much of the business in that line was acquired, and its waterproofing process was becoming well recognized, but its plant was not sufficiently equipped to make a commercial success, and a new plant had to be provided or else the enterprise abandoned. There was in 1912 a reorganization and the plaintiff company incorporated with a capitalization of $375,000, the assets and liabilities of the old company being taken over at $300,000, the balance of the capitalization furnishing an increase of $75,000 in available capital. A new plant was built and a new machine installed, but this machine did not fulfill the guaranty under which it had been bought. So much goods was spoiled and there was so much delay that the company lost its contracts and substantially lost its business. Prolonged litigation followed, during which the company was not able to

reequip or reestablish its business. The litigation was finally terminated in favor of the plaintiff, its machinery was remodeled, and it gradually recovered its business, so that by 1916 it was doing a substantial and growing business and until October of that year operated profitably. Then the plant was destroyed by fire. Speedy adjustment of insurance enabled a rapid restoration of the plant, so that one machine was put in operation by January, 1917, and the plant was gradually completed during that year, so that by the first of November one complete equipment was in place in addition to the machine known as the "grease machine."

> About or before this time and under these conditions the matter of taking up work for the United States came up for consideration and action. To what extent the plaintiff had then regain (sic) a commercial business is not shown. (Second finding of fact, pp. 32 and 33.)

The specific finding of the Court of Claims upon this cause of action is the 15th, page 37. After adopting by reference the facts in the second finding, which have hereinbefore been set forth, that court found as follows:

> The extent to which it had recovered its business during 1917 and the amount thereof during that year is not definitely shown. But whatever it was, it was given up that the capacity of its plant might from January 1, 1918, be devoted to Government work of the kind here involved. When in the latter part

of 1917 this arrangement was made the plaintiff's plant, its processes, business, and good will as a going concern were valuable, but what the value thereof was is not shown to the satisfaction of the court on the present record.

When the Government work ceased in November, 1918, the plaintiff had no other business upon which it could continue the operation of its plant and it became idle. The cessation of hostilities left the Government with large quantities of goods on hand of the kind produced by the plaintiff company and by other concerns producing for the Government the same general character of goods. These goods were sold by the Government at different times in large lots at public auction and generally at prices below cost of production, and the sale of these goods by the Government supplied to a very considerable extent the demands of the trade for this class of goods. In an effort to reestablish its business and preserve the value attaching to its plant as an operating concern and in the belief that if normal conditions should be restored it could again do a profitable business, it has expended considerable sums of money, by operating at a loss, in keeping its business alive and its organization existent, and by reason of such efforts since the cessation of Government work it has sustained an operating loss of $125,000. It has not succeeded in reestablishing its business on a profitable basis, and its plant and business are now worth much less than before it took on Government work and devoted its facilities thereto.

ARGUMENT.

Appellant asks this court to hold that it is entitled to recover from the United States the sum of $125,000 because of the finding of the Court of Claims that "it has expended considerable sums of money, by *operating at a loss,* in keeping its business alive and its organization existent, and by reason of such efforts *since the cessation* of Government work it has sustained *an operating loss* of $125,000."

Is the Government, then, to be held to have guaranteed to all those whose mills and other plants were utilized during the war a profitable business after the war ended, and if so, for how long a period? What authority is there for holding that the Government assumed any such obligation? Not in any act of Congress. Section 1 of the Dent Act, 40 Stat. 1272, authorized the Secretary of War to "adjust, pay, or discharge any agreement, express or implied, upon a fair and equitable basis," that was entered into in good faith prior to November 12, 1918, by any officer acting under his authority or that of the President, but it provided:

> That in no case shall any award, either by the Secretary of War or the Court of Claims, include prospective or possible profits on any part of the contract beyond the goods and supplies delivered to and accepted by the United States and a reasonable remuneration for expenditures and obligations or liabilities necessarily incurred in performing or preparing to perform said contract or order. * * *

And section 2 of the Act confers jurisdiction on the Court of Claims to find and award fair and just compensation in cases specified in Section 1 if the adjustment of the Secretary of War should be unsatisfactory.

Nothing is to be paid for under this contract except—

(1) Goods and supplies delivered to and accepted by the United States; and

(2) Reasonable remuneration for expenditures and obligations or liabilities necessarily incurred in performing or preparing to perform said contract or order.

Everything which the appellant did for the United States has been paid for according to the contract, and the Court of Claims has awarded it a judgment for the expenditures incurred in performing or attempting to perform the contract. There is no dispute about this.

This sum of $125,000, which the appellant now seeks, is an "operating loss" since Government work ended, sustained because—

(1) The appellant had no other immediate business to keep its plant occupied; and

(2) The market was flooded with goods sold by the Government at auction, some of which, it is to be noted, had been procured from the appellant and paid for at prices satisfactory to it.

But these facts do not show any breach of contract by the United States, nor any fact which can be called wrongful in any sense of the word, or upon which any legal liability can be based. Many men

who gave their time and services to the Government during the war found their business and professional employment temporarily lost when it was over, and lack of demand, falling prices, and consequent economic distress was the common experience of almost all business after the war. It may be that appellant was particularly unfortunate. It had been through a series of misfortunes extending over a period of thirteen years and culminating in a fire which destroyed its plant. When it undertook the Government work, the extent to which it had regained "a commercial business is not shown" (p. 33). It is quite likely that this made it unusually difficult for it to attain a position of profitable operation after the war, but whatever may have been the difficulty, the United States was not to blame.

We know of no authority which even intimates that a recovery can be had under such circumstances. None is cited on appellant's brief. That the Government must pay a just compensation for private property taken for public use is beyond question. What it took from the appellant was the entire output of its plant for ten or eleven months. The appellant sought the business and did it for an agreed price, and in addition the Court of Claims has given it over $47,000 for various expenditures deemed properly chargeable against the United States. The United States has, therefore, paid for everything it took from the appellant. The claim is not even based upon a loss from uncompleted business which it sacrificed when it undertook the

Government work, as was one of the claims in *Duesenberg Motor Corporation* v. *United States*, decided by this court November 13, 1922. That claim was a stronger one than this, but the court refused to recognize it. We know of no principle of law or of equity by which the United States, after it has fully discharged its contractual obligation, can be held liable because a contractor's business was unprofitable after the armistice.

The cases cited in appellant's brief tend in no way to support its claim. The case of *Roxford Knitting Company* v. *Pierney*, 265 Fed. 177, merely held that a manufacturer whose entire product was taken by the Government under the National Defense Act, and who was thus unable to perform its then existing contracts with third parties, was not liable in damages to those parties for breach of contract.

The case of *United States* v. *Russell*, 13 Wall. 623, cited on appellant's brief at page 13, really states the rule applicable to this case. Three steamboats employed by their owner in carrying private freight were impressed into the service as transports by the military authority under circumstances of "imperative military necessity." Mr. Justice Clifford, delivering the opinion of the court, said:

> Beyond doubt, such an obligation raises an implied promise on the part of the United States to reimburse the owner for the *use* of the steamboats and for his own *services* and *expenses*, and for the *services of the crews*

> *during the period the steamboats were employed in transporting Government freight* pursuant to those orders. (Italics ours.)

What the Government was bound to do, therefore, was to reimburse the owner for what he had done during the period his boats were employed by the Government. It is not intimated that there was any obligation upon the Government to guarantee profitable operation after the boats were returned to their owner.

So, what the Government was obligated to pay for here was for services performed by the appellant and expenses incurred while its plant was employed in Government work. When the services of the steamers as transports in the *Russell case* ended, the boats were returned to the exclusive possession and control of the owner. In appellant's brief the word "appropriation" is frequently used to characterize the use made of appellant's plant by the War Department, as if that word imported some extraordinary rule of damage; but the *Russell case* held that when the Government compelled the captains and crews of the steamers to perform the services needed, and, as soon as the services for which they were required had been performed, returned them to the exclusive possession and control of the owners, those facts did not constitute an "appropriation." This was the real point of the case, for the Act of July 4, 1864, provided that the jurisdiction of the Court of Claims should not extend to any claim against the United States growing out of the destruction or "appro-

priation" of, or damage to, property by the army or navy engaged in the suppression of the rebellion, and the claim of Russell was sustained because the court held that there had been no "appropriation" of his property, and therefore the Court of Claims had jurisdiction to entertain his suit.

Appellant also refers to the case of *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy Railroad Company*, 257 U. S. 563, for the purpose of showing that, in the case of the railroads, Congress made provision for helping them face the demoralizing lack of credit and income following Government operation by passing the Transportation Act of 1920.

Congress perhaps might have undertaken to guarantee the future earnings of all corporations which had performed Government contracts during the war, and have established a fund to assist them in financing their business during the period of depression. It did not do so, however.

The judgment of the Court of Claims, therefore, should be affirmed.

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JANUARY, 1923.

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